U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JAN 14 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). It is now on appeal before the Acting Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is an elderly care facility. It seeks to permanently employ the beneficiary in the United States as a nurse case manager and requests that she be classified as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

The petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses. *Id.*

The petition was denied by the Director on May 8, 2009, on two grounds: (1) it was filed less than the 30 days after the removal of the notice of filing of an Application for Permanent Employment Certification (ETA Form 9089), in violation of applicable regulations, and (2) the petitioner did not establish its ability to pay the proffered wage of the subject position.

The petitioner filed a timely appeal, supplemented by a letter from counsel and pertinent documentation. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). For the reasons discussed hereinafter, the Director's decision will be affirmed.

Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with an uncertified ETA Form 9089 in duplicate. *See* 8 C.F.R. §§ 204.5(a)(2) and (k)(4); *see also* 20 C.F.R. § 656.15.

If the Schedule A occupation is a professional nurse, the petitioner must establish that the beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); or a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* 20 C.F.R. § 656.5(a)(2).

Petitions for Schedule A occupations must also contain evidence establishing that the employer provided its U.S. workers with notice of the filing of an ETA Form 9089 (posting notice) as prescribed by 20 C.F.R. § 656.10(d), and a valid prevailing wage determination (PWD) obtained in accordance with 20 C.F.R. § 656.40 and 20 C.F.R. § 656.41. *See* 20 C.F.R. § 656.15(b)(2).

For the posting notice requirement, the employer must provide notice of the filing of an ETA Form 9089 to any bargaining representative for the occupation, or, if there is no bargaining representative, by posted notice to its employees at the location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1).

The regulation at 20 C.F.R. § 656.10(d)(3) states that the posting notice shall:

(i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
(ii) State that any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
(iii) Provide the address of the appropriate Certifying Officer; and
(iv) Be provided between 30 and 180 days before filing the application.

Posting notices for Schedule A occupations must also contain a description of the job offered and the rate of pay. *See* 20 C.F.R. § 656.10(d)(6).

The evidence of record establishes that the petitioner met most of the documentation requirements discussed above. However, while notice of the filing of an ETA Form 9089 was posted from January 14, 2009 to January 28, 2009 (the requisite 10 business days), the immigrant visa petition (Form I-140) was filed just seven days later on February 4, 2009 (with the uncertified ETA Form 9089). Thus, the posting notice was not provided during the requisite time period of 30 to 180 days before the filing of the ETA Form 9089, as required in 20 C.F.R. § 656.10(d)(3)(iv).

On appeal counsel acknowledges that the visa petition and the ETA Form 9089 were not filed the requisite 30 days after the 10-day posting notice period, but asserts that no other applications were received for the nursing position during the following 150 days. Counsel cites a declaration by the petitioner's president stating that the petitioner had been seeking a graduate nurse with at least a bachelor's degree for over a year so that it could provide more advanced medical services. As counsel notes, the nursing shortage is recognized in the regulations by providing for Schedule A occupations, which speeds the labor certification process. However, the requirements specified in the regulations serve an identified purpose which may not be ignored. While the petitioner's need for a qualified nurse is not in doubt, the requirements in the regulations ensure that the petitioner's need is adequately weighed against the overall policy concern that U.S. workers not be adversely affected by the filing of a labor certification. *See* 20 C.F.R. § 656.1(a). The regulatory requirements must be met in order in order for a visa petition to be approved.

In this case, since the posting notice did not precede the filing of the petition and the ETA Form 9089 by at least 30 days, it did not comply with the requirement at 20 C.F.R. § 656.10(d)(3)(iv). The instant petition, therefore, is fatally defective. On this ground alone, the petition cannot be approved.

As for the ability to pay issue, the regulation at 8 C.F.R. § 204.5(g)(2) provides as follows:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Thus, the petitioner must establish its continuing ability to pay the proffered wage from the priority date up to the present. *See* 8 C.F.R. § 204.5(g)(2). The priority date of the instant petition is February 4, 2009 – the date the Immigrant Petition for Alien Worker (Form I-140) with the uncertified ETA Form 9089 was filed with USCIS.[1] The proffered wage of the nursing position, as stated in box G of the ETA Form 9089, is $26,400 per year.

On appeal the petitioner submitted copies of (1) a letter from its president, dated December 15, 2008, claiming that the petitioner had the financial ability to pay the salary offered to the beneficiary; (2) a profit and loss statement for the months of January through October 2008 and a balance sheet as of October 31, 2008, each co-signed by the petitioner's treasurer and president; and (3) an "independent auditor's report" of a certified public accountant (CPA) in Puerto Rico, based on the petitioner's balance sheet and related financial statements as of December 31, 2007. These documents have little probative value. For one thing, they all predate the priority date of February 4, 2009, and therefore do not represent evidence of the petitioner's continuing ability to pay the proffered wage from the priority date up to the present. As for the profit and loss statement and balance sheet for 2008, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying the profit and loss statement and balance sheet for 2008, the AAO cannot conclude that they are audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence of the petitioner's ability to pay the proffered wage. As for the "independent auditor's report" of the petitioner's balance sheet as of December 31, 2007, the CPA stated in his cover letter that the petitioner had filed a bankruptcy petition under Chapter 11 of the U.S. Bankruptcy Code on October 25, 2005, that the financial statements did not include any adjustment that might result from this proceeding, and that because of the petitioner's financial uncertainty, the CPA was "unable to express . . . an opinion on the financial statements." Based on the CPA's own disclaimer, the AAO concludes that the petitioner's financial statements as of December 31, 2007 are not reliable evidence of the petitioner's ability to pay the proffered wage.

No other evidence was submitted in support of the instant petition. Therefore, the petitioner has failed to establish its continuing ability to pay the proffered wage from the priority date up to the present. On this ground as well, the petition cannot be approved.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly, the Director's decision to deny the petition will be affirmed. The appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act,

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[1] The regulation at 8 C.F.R. § 204.5(d) provides that "[t]he priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation . . . shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [USCIS)]." If the petition is approved, the priority date is used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad.

8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The Director's decision denying the petition is affirmed. The appeal is dismissed.